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Supreme Court of the United States

OCTOBER TERM, 1965

No. 523

ANTHONY ALBANESE,

Petitioner,

against

N. V. NEDERL. AMERIK STOOMV. MAATS.,

Respondent,

against

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Co-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The opinion of the United States Court of Appeals for the Second Circuit is reported at 314 F. 2d 323.

Jurisdiction

Although jurisdiction may exist under Title 28 U.S.C. Sections 1254(1) and 2101(c), the petition fails to establish any genuine grounds for the granting of a writ under Rule 19(1,b) or Rule 20 of the revised Rules of this Court.

Questions Presented

Petitioner seeks a review by this Court of the judgment of the Court of Appeals for the Second Circuit, which set aside a judgment in favor of petitioner, a longshoreman, against respondent, a vessel owner, upon whose vessel petitioner claims to have sustained injury, and ordered a new trial because of error in the charge and in the admission of evidence.

The petition presents no novel question nor any special compelling or important reason for a review of the case by this Court. The respondent on its appeal to the Circuit Court from the judgment in favor of petitioner had urged error of the District Court in failing to direct a verdict in favor of the respondent, both on the issues of unseaworthiness and negligence; error in the submission of the case to the jury in several respects on both issues; errors in the admission or rejection of testimony, and gross excessiveness of the verdict.

Having found error in the submission of the case to the jury on the question of negligence and in the improper admission of certain evidence, the Court of Appeals has directed a new trial of the case. Since a new trial has been granted petitioner, he cannot, of course, have been deprived of any right to a jury trial under the Seventh Amendment. In granting a new trial, the Court has in fact sustained petitioner's right to have a jury pass on the claims made by him, and has overruled respondent's contention that it was entitled to directed verdicts. Other questions raised by respondent on appeal, in view of the fact that a new trial has been granted, have not specifically been passed upon by the court below.

Thus, all that the petitioner seeks to have reviewed by this Court are rulings by the Court of Appeals as to the propriety of the charge on negligence and as to the admis-

sion in evidence, as against respondent, of one of the Safety and Health Regulations for Longshoring promulgated by the Secretary of Labor, although respondent was not the employer of the longshoremen. Neither of these questions could be completely dispositive of this case, nor could be of far reaching consequence since the case has been remanded for a new trial.

As will hereinafter be pointed out, the ruling of the Court of Appeals with respect to the error in the charge on negligence not only is not contrary to any decision of this Court but is in clear accord with the decisions of this Court in *United New York and N.J.S.H. Pilots Assn.* v. *Halecki,* 358 U. S. 613; *Kermarec* v. *Comp. Gen. Transatlantique,* 358 U. S. 625 and *West* v. *United States,* 361 U. S. 118, and with a long line of decisions in the Court of Appeals for the Second Circuit, as to which this Court has consistently denied certiorari.

As to the ruling on the admissibility of the Safety and Health Regulation for Longshoring, the decision of the Court of Appeals, as will hereinafter be pointed out, is not only not in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Provenza* v. *American Export Lines Inc.,* 324 F. 2d 660, cert. den. 376 U. S. 952, but is completely consistent with that decision.

Where a case is submitted to a jury for a general verdict on alternate grounds, one of which is not sustainable as a matter of law or where error is found in the admission of evidence, the verdict must be vacated and a new trial granted. *Sunkist Growers* v. *Winckler & Smith Co.,* 370 U. S. 19, 29-30; *United New York and N.J.S.H. Pilots Assn.* v. *Halecki,* 358 U. S. 613, 619; *Fatovic* v. *Nederlandsch-Ameridaansche Stoomvaart,* 275 F. 2d 188, 190; *Mosley* v. *Cia. Mar Adra, S. A.,* 314 F. 2d 223, 226-227, cert. den. 375 U. S. 829, 835.

Statement of the Case

The petitioner, together with eight other longshoremen comprising the No. 2 gang, had been working in the lower No. 2 hold of the vessel since approximately 8:00 A.M. During all this time a gasoline-powered hilo, owned and placed aboard by his employer, the co-petitioner, had been in continuous operation in the hold. At about 10:45 A.M. a second gang of longshoremen, comprised of nine men, identified as the No. 7 gang, began working in the after half of the upper 'tween deck, also employing a hilo owned and placed aboard by their employer, the co-petitioner. About 10 or 15 minutes after this second gang began working, the longshoremen complained of fumes from the hilos, and then, for the first time, requests were made of a ship's officer to turn on the ship's forced ventilating system, which although designed primarily for the ventilation and dehumidifying of cargo while the vessel is at sea with the hatches closed, could and had often been used as a forced ventilating system during the course of the loading of cargo. Up until that time no complaint had been made by any of the longshoremen of conditions in the hold, and no request had been made by any of the hatch bosses or other supervisory employees of the stevedore for forced ventilation.

On the issue of negligence, the trial court charged the jury (App. to Deft.-Appellant's Brief, pp. 14a-15a):

> "Under the circumstances, the shipowner owed to the plaintiff, so reads the law, the duty to use reasonable care to see that the hold area was a reasonably safe place in which to work. So the shipowner was under a duty, if there was any danger involved in the work which subjected plaintiff to unreasonable or peculiar risk of injury which the shipowner knew of *or in the exercise of reasonable care should have known of or discovered,* and to have advised the plaintiff or to

take adequate steps to protect him against such dangers, because it is the law that the shipowner's duty to the plaintiff was entirely independent of any which his employer, the stevedore company, owed to him, entirely independent, and the fact that his employer owed him a substantially similar duty did not relieve the shipowner of its obligations to the plaintiff. It is what the law terms a non-delegable duty, one that could not be transferred to another." (Emphasis supplied.)

In connection with the proof that a request had been made to a ship's officer to turn on the ship's ventilating system and that he had promised to do so, the court charged the jury as follows (App. to Deft.-Appellant's Brief, p. 15a):

"If you believe this testimony, such requests would be sufficient to put the shipowner on actual notice that an unsafe condition existed. Even if you believe that the defendant did not have actual knowledge of the unsafe condition in the hold, you may find, considering all the evidence you have heard, that the condition existed for a sufficient length of time to charge the shipowner with notice of it."

The Court of Appeals in its original opinion held that:

"This was erroneous, for a shipowner who hires a qualified stevedore to load the vessel is not bound to any duty of active supervision of the stevedore's work." (Petition, App. C, p. 30.)

In its revised opinion, this sentence was amended to read as follows:

"This was erroneous, for when a shipowner hires a qualified stevedore to load the vessel the standard of due care does not require that he actively super-

vise the stevedore's work or that he take available steps to rectify a dangerous condition created by the stevedore which he does not know to exist." (Petition, App. B, p. 23)

In its revised opinion the Court of Appeals went on to say:

"As pointed out in *Berti* v. *Compagnie de Navigation, etc.*, 213 F. 2d 397, 2 Cir. 1954, to lay down a contrary rule, which on the facts here would mean that mere knowledge of the use of hilos would create a duty on the part of the owner to turn on the ventilators even though he had no knowledge that the hold had become an unsafe place to work, would be to confuse the concept of unseaworthiness with that of negligence."

During the presentation of third-party defendant's case, the stevedore, the co-petitioner, over strenuous objection by respondent, was allowed to read into evidence Section 9.93(a) of the Safety and Health Regulations for Longshoring, promulgated by the Secretary of Labor, effective March 21, 1960 (29 C.F.R. Sec. 9.1, *et seq.*; renumbered as of January 1, 1964, Sec. 1504.1, *et seq*), pursuant to Public Law 85-742 (72 Stat. 835), 33 USCA Sec. 941 (a)-(g), (App. to Deft.-Appellant's Brief, pp. 248a-250a, 254a-258a). The Court specifically charged that these regulations were equally as binding upon the shipowner as upon the stevedore-employer (App. to Deft.-Appellant's Brief, pp. 258a-259a, 260a), despite the fact that the regulations were promulgated pursuant to the Longshoremen's and Harbor Workers' Compensation Act, and by their terms (Sec. 9.1(a) and (b), now 1504.1(a) and (b), Sec. 9.2, now 1504.2, and Sec. 9.3(c) and (d), now 1504.3(c) and (d)), apply only to the stevedore-employer and specifically exclude any intent "to place additional responsibility or duty on owners, operators, agents or masters of vessels unless such persons are acting as employers" (Sec. 9.2, now 1504.2).

As to this ruling of the district court, the Court of Appeals held as follows (Petition, App. B, p. 25):

> "There is, however, one other ruling which was erroneous on the proof here. That is the instruction that the Safety and Health Regulations for Longshoring were binding on the shipowner, in spite of the excluding clause of Sec. 9.2(b) and the lack of any testimony as to what the concentration of carbon monoxide in the hold in fact was. Ordinarily, such regulations of stevedoring practices are not relevant to the issues involved in the claim against the shipowner, and clearly could only confuse the issue here, where, although it was stipulated that the ship's blowers were adequate if used, there was no evidence from which the jury could determine whether the level of gas concentration at which the stevedore was forbidden to work without blowers had in fact been reached."

While there was evidence in the case that someone had been observed in the lower hold at 10:10 A.M. with an instrument used for making tests of carbon monoxide content, there was no proof as to whether he actually made a test or, if so, what it disclosed (App. to Deft.-Appellant's Brief, pp. 172a-173a).

Thus the question presented in this case was not whether the Safety and Health Regulations could be used as evidence establishing generally accepted standards of safety, as petitioner repeatedly states, but whether the regulations could be used as establishing an obligation on the part of the shipowner, in the context of this case, to use its forced ventilating system, which was the import which the district court gave to the regulations.

It is not true, as stated by petitioner, that: "Respondent itself first referred to these regulations and offered portions thereof in evidence". (Petition, p. 7). Questions ad-

dressed by respondent to third-party defendant's pier manager relating to what the regulations required of him, were excluded upon objection thereto (App. to Pl.-Appellee's Brief, p. 32a, App. to Third-Party Deft.-Appellee's Brief, pp. 26a-27a).

Neither is it true, as stated by petitioner at page 8 of his petition, that there was uncontradicated proof of substantial air contamination in the lower hold before and during petitioner's collapse. There were nine men working in the lower hold at the time plaintiff collapsed, and an additional nine men working in the upper 'tween deck. It was stipulated at the trial that the plaintiff was the only one who made any complaint of being overcome by carbon monoxide, or who received any emergency treatment (App. to Deft.-Appellant's Brief, p. 130a).

As above pointed out, although someone had been in the hold with a carbon monoxide measuring instrument, there was no testimony as to what, if any, findings he made. That the hold may have appeared hazy after the accident is of no consequence, since carbon monoxide is both colorless and odorless (App. to Deft.-Appellant's Brief, p. 103a). Plaintiff's medical expert admitted that for a person to be subjected to carbon monoxide poisoning depends upon the concentration of carbon monoxide in the air and the length of exposure (App. to Deft.-Appellant's Brief, p. 103a), and that there have been tolerable limits established for working over extended periods of time, even as much as eight hours a day in confined areas (App. to Deft.-Appellant's Brief, p. 102a). As for his alleged testimony that from the effects on petitioner, one "must assume" adequate concentration to cause intoxication, his testimony on cross-examination was as follows:

> "Q. So that when you expressed an opinion with respect to exposure to carbon monoxide fumes in the hold of a vessel as it being a competent producing cause of carbon monoxide poisoning, you were express-

ing that opinion without any knowledge at the time you expressed that opinion of the degree of concentration of carbon monoxide in the air which would be necessary to cause a carbon monoxide poisoning? A. Oh, I'm sorry. I misinterpreted your question. I assumed, of course, that there was adequate carbon monoxide concentration in the hold to which this patient was exposed to cause his intoxication. This adequate concentration varies considerably based upon time of exposure and actual air concentration, and these I do not know." (App. to Pltf.-Appellee's Brief, p. 5a)

He also conceded with respect to plaintiff that he was unable to state whether the brain injury was a result of anoxia or of plaintiff's fall into the hold (App. to Pltf.-Appellee's Brief, p. 5a).

ARGUMENT

A—As to the error in the charge.

Not a single case in this Court is cited by petitioner for the rather astounding statement that the opinion of the Court of Appeals for the Second Circuit in this case was "written with apparent disregard of the paramount authority of well defined principles enunciated by this Court", or for the equally astounding statement that the opinion of the Court of Appeals for the Second Circuit "seeks to establish a novel and retrogressive principle of law exonerating a shipowner from its historic and non-delegable obligation of due diligence and care when it * * * should have known that a longshoreman was working in an unsafe place aboard its merchant vessel in navigable waters". Neither is there any case law cited for no less astounding statement that: "By this decision a remedy in

negligence for maritime workers doing the work of seamen is diluted to less than any other common-law personal injury litigant would expect" (Petition, p. 10).

Petitioner seems to claim that contrary to the law as enunciated by this Court, a business invitee, be he a longshoreman, is entitled in negligence to a higher standard of care on the part of a shipowner than would be any other person lawfully on board the shipowner's vessel on purposes not inimical to the interests of the shipowner. This notion was struck down by this Court in *Kermarec* v. *Transatlantique,* 358 U. S. 625, wherein this Court stated: "The distinctions which the common law draws between licensee and invitee" (358 U. S. 630) will not be incorporated into admiralty law, since: "The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea" (Id. 631-632). In the cited case, this Court enunciated the following principle (358 U. S. 632):

> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case."

On the same date on which *Kermarec* was handed down, this Court also handed down its decision in *United New York and N.J.S.H. Pilots Assn.* v. *Halecki,* 358 U. S. 613, in which this Court, reversing a general verdict rendered upon the grounds of unseaworthiness and negligence (holding that the warranty of seaworthiness was not applicable to the plaintiff), found a jury question for determination where the shipowner had required plaintiff's employer to clean its ship's generators with carbon tetrachloride, whether the shipowner had exercised reasonable care in

permitting or authorizing the method or manner of the use of the carbon tetrachloride in the confined space of the ship's engine room while the ship was in drydock.

In *West* v. *United States,* 361 U. S. 118, this Court struck down a contention that alternative to liability of the shipowner for unseaworthiness, there could be liability for a breach of a non-delegable duty to furnish a safe place to work (Id., p. 122). In holding that apart from the doctrine of seaworthiness, there is in the maritime law "no basis of liability apart from fault" (Id., p. 123), the Court unanimously concluded that (p. 123):

> "The respondent (shipowner), having hired Atlantic to perform the overhaul and reconditioning of the vessel—including the testing—was under no duty to protect petitioner from risks that were inherent in the carrying out of the contract",

citing the decision of the Court of Appeals for the Second Circuit in *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, which petitioner refers to as "inapposite and long overruled". This Court said, citing that case (361 U. S. 123):

> "Although some of respondent's employees were on board the ship here, this would not attach liability since they gave no orders, and did not participate in the work or supervise its progress, but were simply inspectors or observers,"

It may be true that, as said by the Court of Appeals in this case, a finding of negligence could be justified if the hatch bosses sometime between 10:55 and 11:05 A.M. asked a ship's officer to turn on the ship's ventilating system and he agreed to do so, if also his failure to do so was a proximate cause of plaintiff's injury; but in this case that question was not even submitted to the jury. The fact issue as to whether such a request had been made of a ship's officer and such promise was made by him, was sub-

mitted to the jury in this case only on the question of whether the shipowner had actual or constructive notice that an unsafe condition existed. Thus the District Court specifically charged the jury as follows (App. to Deft.-Appellant's Brief, p. 15a):

> "If you believe this testimony, such requests would be sufficient to put the shipowner on actual notice that an unsafe condition existed. Even if you believe that the defendant did not have actual knowledge of the unsafe condition in the hold, you may find, considering all the evidence you have heard, that the condition existed for a sufficient length of time to charge the shipowner with notice of it."

The question here presented is whether it was error for the Court to charge that without such a request the shipowner could be held in negligence for constructive knowledge that an unsafe condition had been created in the hold by reason of the exhaust of carbon monoxide fumes from hilos brought into the hold by the stevedores, owned by them, under their sole supervision and control and being used solely by them, where the stevedore was an independent contractor employed under a written contract as an expert, having sole supervision and control over the loading of the vessel (Deft's Ex. D, App. to Deft.-Appellant's Brief, pp. 273a-282a, received in evidence, p. 227a). This, we submit, has been already answered by this Court in *West*, and by the Circuit Court of Appeals in *Filipek* and a long line of similar decisions.

In *West*, this Court distinguishes both *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, and *United New York and N.J.S.H. Pilots Assn.* v. *Halecki*, *supra*. As to *Crumady*, this Court pointed out that it was the shipowner's own employees who had set the safety cut-off device on the winch at twice the tonnage limit of the rigging,

and thus made it unsafe and dangerous (361 U. S. at pp. 123-124).

As to *Halecki,* this Court stated that the basis of its decision there was that "the shipowner directed the use of carbon tetrachloride in the confined spaces of the engine room" (361 U. S. App. 124).

The decision of the Court of Appeals in the present case, following its prior decisions in *Berti* v. *Compagnie de Navigation,* 213 F. 2d 397 and *Filipek* v. *Moore-McCormack Lines, Inc.,* 258 F. 2d 734, cert. den. 359 U. S. 927, was but applying the rule which it has consistently applied and which this Court, by the citation of *Filipek* in *West,* has approved. See *Gallagher* v. *United States Lines,* 206 F. 2d 177, cert. den. 346 U. S. 897, reh. den. 346 U. S. 940; *Lyon* v. *United States,* 265 F. 2d 219; *Oblatore* v. *United States,* 289 F. 2d 400, 402; *Puddu* v. *Royal Netherlands S. S. Co.,* 303 F. 2d 752, 753, cert. den. 371 U. S. 840, reh. den. 371 U. S. 917; *Forkin* v. *Furness, Withey & Co.,* 323 F. 2d 638, 640.

It is obviously no distinction, as to the applicable rule of law, that in some instances the plaintiffs, as in *Filipek,* were not persons entitled to the warranty of seaworthiness; for in other cases, as in *Gallagher, Berti, Oblatore* and *Puddu,* they were longshoremen, and by this Court's decision in *Kermarec,* it makes no difference respecting a shipowner's liability in negligence whether the plaintiff was a longshoreman entitled to the warranty of seaworthiness or not. What petitioner is here seeking to do is to put the longshoreman in a class by himself, not only with respect to the warranty of seaworthiness but also with respect to negligence. It is eminently clear, we submit, that as said by the Court of Appeals in its decision herein, to lay down a contrary rule than that enunciated by the Court of Appeals would be to confuse the concept of unseaworthiness with that of negligence. That is precisely the error which the Trial Court made in this case, for

at another point in its charge it said: "the shipowner's obligation to provide a seaworthy vessel includes the obligation to provide plaintiff with a reasonably safe place to work" (App. to Deft.-Appellant's Brief, p. 21a).

By the decision of this Court in *Mitchell* v. *Trawler Racer Inc.*, 362 U. S. 539, it has definitely been established that there "is a complete divorcement of unseaworthiness liability from concepts of negligence. To hold otherwise now would be to erase more than just a page of history" (Id., p. 550).

Even in cases involving seamen who have the benefit of the seaworthiness warranty and of the Jones Act, this Court has been careful to distinguish between the concepts of unseaworthiness and applicable negligence: See *Michalic* v. *Cleveland Tankers*, 364 U. S. 325, 327-328.

In none of the cases cited by petitioner at page 11 was the principle of *Berti*, as to negligence, ever questioned. Only as to the holding with respect of unseaworthiness was the validity of that case questioned by the District Court in *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 212 at page 215. The decision of the District Court in *Holley*, which was not appealed, has itself been subjected to criticism by other courts. See *Holmes* v. *Mississippi Shipping Co.* (CA 5), 301 F. 2d 474, 478-479; *Cavelleri* v. *Isthmian Lines Inc.* (SDNY), 190 F. Supp. 801.

In *Gutierrez* v. *Waterman S. S. Corp.*, 373 U. S. 206, referred to by petitioner (p. 11), the plaintiff, who was working upon a dock, was caused to be injured by slipping on loose beans which had been spilled from broken bags being unloaded from defendant's vessel. It appeared from the evidence that the bean bags which were being discharged "were leaking while still in the ship", that "beans spilled out of the bags throughout unloading" and that "coopers were sent aboard to repair the torn bagging" (Id., p. 211). This was the condition of the cargo at the time it was offered by the ship to the stevedore for dis-

charge. It was in relation to the shipowner's duty with respect to the creation of foreseeable risk of harm by reason of unloading bags in that condition, and only in that respect, that the Court referred to the shipowner as having an absolute and non-delegable duty of care toward the plaintiff not to create such risk, likening the case to *Byrne* v. *Boadle,* 2 H & C 722 (Exch.), where a pedestrian was hit by a barrel which the property owner allowed to drop from his loft (Id., p. 211). Thus *Gutierrez* has no similarity to the present case whatever.

That the plaintiff, if a shoreside common law personal injury litigant, under the circumstances of this case could have no recovery whatever absent a specific direction or assurance of safety given to him in respect of the instrumentality of his injury, is settled beyond peradventure of argument. Since this is a diversity case, plaintiff's rights, if he were a non-maritime employee injured ashore, would be regulated by New York law. Under New York law, in the context of this case, he clearly could have no recovery whatever. *Uppington* v. *City of New York,* 165 N. Y. 222, 233-235; *Hess* v. *Bernheimer & Schwartz Brewing Co.,* 219 N. Y. 415, 418-419; *Iacono* v. *Frank & Frank Contracting Co.,* 259 N. Y. 377, 381; *Gallagher* v. *United States Lines Co.* (CCA 2), 206 F. 2d 177, 179; *Wallach* v. *United States,* 291 F. 2d 69, 70, cert. den. 368 U. S. 935; *Galbraith* v. *United States,* 296 F. 2d 631; *Broderick* v. *Cauldwell-Wingate Co.,* 301 N. Y. 182, 187; *Zucchelli* v. *City Construction Co.,* 4 N. Y. 2d 52; *Gasper* v. *Ford Motor Co.,* 13 N. Y. 2d 104; *Wright* v. *Belt Associates Inc.,* 14 N. Y. 2d 129, 134; *Persichilli* v. *Triborough Bridge & Tunnel Authority,* 16 N. Y. 2d 136, 145-146.

B—As to the Safety and Health Regulations for Longshoring.

The District Court in the present case allowed to be read to the jury Section 9.93(a) of the Safety and Health Regulations for Longshoring (29 C.F.R. Sec. 9.1, *et seq.,*

renumbered as of January 1, 1964, 1504.1, *et seq.*), promulgated by the Secretary of Labor in 1960 pursuant to Public Law 85-742 (72 Stat. 835), 33 U.S.C.A. Sec. 941(a) through (g), the Longshoremen's and Harbor Workers' Compensation Act, reading as follows:

> "(a) When internal combustion engines exhaust into the hold or intermediate deck, and neither natural ventilation nor the ship's ventilating system is adequate to keep the carbon monoxide content of the atmosphere in the hold or intermediate deck below 100 parts per million, the employer shall use blowers sufficient in size and number and so arranged as to do so. The intakes of blowers shall be adequately guarded by screens",

charging over the objection of respondent (App. to Deft.-Appellant's Brief, pp. 248a-250a, 254a-257a) that this Regulation was equally as binding upon the shipowner as upon the stevedore (App. to Deft.-Appellant's Brief, pp. 258a-259a, 260). The regulation was not submitted to the jury as a pertinent standard of safety, as so often stated by petitioner, but rather as a regulation binding upon the shipowner as well as upon the stevedore.

The effect of reading the regulation to the jury, coupled with such an instruction, was to import to the jury that there was a statutory duty imposed upon the shipowner to employ the ship's ventilating system to keep the carbon monoxide content below 100 parts per million, and that only if the ship's ventilating system should prove inadequate to do so was there any obligation upon the employer to use blowers. In view of the stipulation in the record that the ship's ventilating system was adequate, in view of the charge that the ship could be held liable in negligence for constructive knowledge that an unsafe condition had been created in the hold by the exhaust of the hilos, and in view of the fact that there was no evidence

whatever as to what the concentration of carbon monoxide in the hold in fact was, it becomes apparent that if in fact this Regulation does not impose a statutory obligation upon the shipowner to use the ship's blowers to keep the concentration below 100 parts per million, the error in allowing the regulation to be read to the jury with such an instruction was not only highly prejudicial to the respondent, but possibly the controlling factor in bringing about the verdict which was in fact rendered; for the jury could have concluded that it was the shipowner's obligation to ascertain whether the carbon monoxide content had exceeded the allowable limit.

By a clarifying amendment to Regulation 9.93(a) promulgated by the Secretary of Labor on November 9, 1961 (26 F. R. 10795-97, November 18, 1961), Section 9.93(a) was amended to read as follows (now Sec. 1504.93(a)):

> "(a) Ventilation requirements with respect to carbon monoxide:
>
> (1) When internal combustion engines exhaust into the hold or intermediate deck, the employer shall see that tests of the carbon monoxide content of the atmosphere are made as frequently as conditions require to ensure that dangerous concentrations do not develop. Employees shall be removed from the compartment involved when the carbon monoxide concentration exceeds 100 parts per million (.01%). When neither natural ventilation nor the vessel's ventilating system is adequate to keep the carbon monoxide concentration below this allowable limit, the employer shall use blowers sufficient in size and number and so arranged as to accomplish this before work is resumed."

The clarifying amendment makes it eminently clear that the intent of the Regulation was to put squarely upon the shoulders of the stevedore, the obligation to see to

it that the concentration of carbon monoxide does not exceed the allowable limit and to remove his employees from the work area if it should, until provision has been made to keep the concentration within the allowable limit, permissively authorizing the use of ship blowers for that purpose but not exonerating the employer from the obligation to supply his own blowers if the ship's system should be inadequate. This clarifying amendment gives clear indication that it was never the intent of the Secretary of Labor to attempt to exceed his statutory authority by imposing obligations upon the shipowner.

The case of *Provenza* v. *American Export Lines*, 324 F. 2d 660, cert. den. 376 U. S. 952, not only does not support the use which the District Court allowed to be made of the regulation in the present case, but is entirely in accord with the decision of the Court of Appeals in the present case. In *Provenza*, the Court, recognizing that the Regulations were enacted pursuant to the authority of the 1958 Amendment to the Longshoremen's and Harbor Workers' Compensation Act (Id., p. 663), rejected plaintiff's contention that a violation of the Regulations, "no matter by whom violated, *ipso facto* makes the shipowner liable" (pp. 663-664), saying (p. 665), "here the Regulations by their express terms apply only to the stevedore", and further (p. 665): "The regulation casts upon the shipowner no new duty nor does it relieve him of any pre-existing duty." This obviously must be so since; (1) the authority of the Secretary of Labor to enact the Regulations derives solely from the Longshoremen's and Harbor Workers' Compensation Act which is applicable only to employers in respect of employees covered by the Act; (2) the Regulations by their very terms and by the definitions contained therein reject any implication of imposing obligations upon shipowners who are not employers of labor covered by the Act (Secs. 9.1, 9.2, 9.3(c) and (d), now renumbered Sec. 1504.1, 1504.2, 1504.3(c) and (d)).

While the Safety and Health Regulations may be employed as against a shipowner in determining whether or not a ship is or is not unseaworthy, they obviously cannot be employed to establish a duty upon the shipowner to take action in accord with the Regulations. The limitation upon the proper use of these Regulations as against a shipowner is well expressed in the opinion of the District Court in *Deffes* v. *Federal Barge Lines, Inc.*, 229 F. Supp. 719, 721:

> "Violation of a safety regulation applicable to a stevedore does not render a vessel unseaworthy unless the violation creates a dangerous condition aboard the vessel, which would constitute a defect in the vessel's hull, gear, stowage and appurtenant appliances and equipment."

A proper use of the Regulations in the instant case would have been to charge the jury that under the safety standard established by the Regulations, there was no proof in this case that an unsafe condition had in fact been created in the hold.

This Court's decision in *Kernan* v. *American Dredging Co.*, 355 U. S. 426, has no application whatever to the case at bar. That case involved a claim for the wrongful death of a seaman under the Jones Act, which in turn is based upon the Federal Employers Liability Act (Id., pp. 428-430). The regulation which was there involved was a Coast Guard Regulation specifically made binding upon the owner of the vessel. The basis of the Court's decision was that the Jones Act, incorporating as it does the F.E.L.A., establishes in seamen's cases a type of liability for the breach of a statutory duty without regard to negligence concepts (Id., pp. 430-433). In so doing this Court pointed out that under the Jones Act, as under the F.E.L.A., the employer's "fault may consist of a breach of the duty of care, analogous but by no means identical to the general common law duty, or of a breach of some statutory duty"

(Id., p. 432). The present case, of course, does not involve the Jones Act since the plaintiff was neither a seaman nor the defendant his employer.

Kernan is, of course, likewise distinguishable from the present case upon the ground, as pointed out in *Provenza*, "because the regulation in that case applied to the shipowner, where as here the regulations by their express terms apply only to the stevedore" (324 F. 2d at p. 665).

In *Provenza*, in stating that if a violation of the regulations by the stevedore created a dangerous condition, then the shipowner was in turn also liable, the Court was referring to liability for unseaworthiness. The balance of the quotation, which petitioner fails to give at page 14, clearly indicates this, for it concludes: "for that is the nature of the owner's duty of seaworthiness" (Id., p. 665). We are here dealing not with the doctrine of seaworthiness but with the concept of negligence. In that concept, clearly *Kernan* has no application and there is no divergence between the decision of the Court of Appeals in this case and the decision of the Court of Appeals for the Fourth Circuit in *Provenza*.

Conclusion

For the foregoing reasons petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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on the Brief.

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